Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

No. 93-592

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THE DOW CHEMICAL COMPANY,

Petitioner,

-vs-

ASOCIACION NACIONAL DE PESCADORES
A PEQUENA ESCALA O ARTESANALES DE COLOMBIA,
et al.,

Respondents.

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**On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit**

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# Respondents' Brief in Opposition To Petition for Writ of Certiorari

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## QUESTIONS PRESENTED

1. Defendants removed this case to the U.S. District Court, alleging Diversity of Citizenship and an Amount in Controversy in excess of $50,000. Plaintiffs moved to remand. Was remand proper when, in the words of the Court of Appeals:

> (1) the complaint did not specify an amount of damages, and it was not otherwise facially apparent that the damages sought or incurred were likely above $50,000;
>
> (2) the defendants offered only a conclusory statement in their notice of removal that was not based on direct knowledge about the plaintiff's claims; and
>
> (3) the plaintiffs timely contested removal with a sworn, unrebutted affidavit indicating that the requisite amount in controversy was not present.

988 F.2d at 566.

2. The plaintiffs are seven hundred fishermen, each suing for his or her personal injuries and/or economic loss. Can the claims of the individual fishermen be

aggregated to achieve the requisite Amount in Controversy?

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Respondents respectfully submit this brief in opposition to Respondent Dow Chemical Company's Petition for a Writ of Certiorari.

## OPINIONS BELOW

The Petition seeks review of a

published opinion of the Fifth Circuit, Asociacion Nacional de Pescadores a Pequena Escala o Artesanales de Colombia v. Dow Quimica de Colombia, 988 F.2d 559 (1993). This opinion, as well as the District Court's Order of Dismissal, are printed in Petitioner's Appendix.

## JURISDICTION

This Court's jurisdiction was properly invoked, pursuant to 28 U.S.C. 1254(1).

## STATUTES INVOLVED

This case involves the Amount in Controversy provisions of the Diversity statute, 28 U.S.C. 1332, which is printed in Petitioner's Appendix.

## STATEMENT OF THE CASE

This is an action for personal injuries and prospective pecuniary loss arising out of the June 19, 1989, pesticide spill into the Bay of Cartagena, Colombia. Plaintiffs are approximately 700 small-scale fishermen injured by the spill. Plaintiffs originally

filed the action in the state District Court, Harris County, Texas, on December 21, 1990. (R. 168-83, Pet. Apdx. 27a - 42a).[1] The defendants were Dow Quimica de Colombia, a Colombian corporation, the owner of the plant, and Dow Chemical Company, an American Corporation. The American Corporation is sometimes referred to in this brief as Dow Chemical Company (U.S.A.).

On February 15, 1991, the Defendants removed the case to the United States District Court for the Southern District of Texas. (R. 157, Pet.Apdx. 43a). Dow Quimica de Colombia then moved to dismiss for lack of personal jurisdiction. (R. 150). Dow Chemical Company (U.S.A.) moved to dismiss for Forum Non Conveniens (R.130).

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[1]. Citations to the Record on Appeal prepared by the Clerk of District Court are abbreviated R. ___. Citations to the Transcript of Hearing of April 15, 1991, are abbreviated T. ___. Citations to Petitioner's Appendix are abbreviated Pet.Apdx. ___.

On March 15, 1991, plaintiffs moved to remand the case to state court due to lack of subject-matter jurisdiction. (R. 107). Plaintiffs argued that neither Amount in Controversy nor Complete Diversity requirements had been met.

On April 15, 1991, the District Court, the Honorable Lynn N. Hughes, presiding, heard and considered all pending motions. (R. 5, 78). On April 16, 1991, the District Court dismissed the action in an order:

1. Denying plaintiffs' motion to remand;

2. Dismissing the case against Dow Quimica de Colombia for lack of personal jurisdiction;

3. Dismissing the entire case for forum non conveniens. (R. 4, Pet. Apdx. 24a).

From that Order of Dismissal, plaintiffs appealed on May 13, 1991. (R. 1, Pet.Apdx. 24a), to the United States Court

of Appeals for the Fifth Circuit. On April 15, 1993, the Court of Appeals, Garza, Garwood, and Duhe, JJ., affirmed the dismissal of the case against defendant Dow Quimica de Colombia, S.A. It vacated the judgement of the District Court with respect to Dow Chemical (USA), and ordered the case remanded to State Court. Asociacion Nacional de Pescadores a Pequena Escala o Artesanales de Colombia v. Dow Quimica de Colombia, 988 F.2d 559 (1993). Rehearing was denied on September 8, 1993.

## STATEMENT OF FACTS

This personal injury and economic damage case arises out of the June 19, 1989, pesticide spill into the Bay of Cartagena, Colombia. The action was originally filed in Texas state court, and removed by defendants. The plaintiffs are small-scale commercial fishermen who were injured by that spill. (R. 173). Plaintiffs allege that because of the spill, they suffered

personal injuries (R. 179) and economic losses (R. 178).

One of the plaintiffs in this action is "ANPAC" (Asociacion Nacional de Pescadores a Pequena Escala o Artesanales de Colombia/ Colombian Association of Small-Scale or Craft-Scale Fishermen). ANPAC is pursuing no claim on its own behalf in the instant case. (Affidavit of Dr. German Sarmiento Palacio, R. 91, Pet.Apdx. 53a). Instead, ANPAC is simply acting as a collection agent for its individual members. Id. Any proceeds ANPAC receives from the instant case are held for the benefit of is individual members. Id.

In order to prosecute this case in the courts, each individual plaintiff executed a power of attorney to ANPAC. (Original Petition, R. 174, Pet.Apdx. 34a). Each of these powers of attorney is, except for the names, identical. A representative copy is found at pages 93 and 94 of the Record. The

translation into English is found at page 95 of the Record.

Each power of attorney provides in part:

> The person who signs the present document grants Special Power of Attorney, but ample and sufficient to . . .ANPAC in order that, in our name bring legal action against the DOW CHEMICAL OF COLOMBIA, S.A., or any Company linked, originated in the spill of the product: LORSBAN 4-E-PESTICIDE, coming from the reservoirs of the named company, which happened on June 19th, 1989.

(R. 95).

ANPAC paid no consideration for any of the powers of attorney. (R. 91). ANPAC is pursuing no claim on its own behalf. Its only claim in this action arises out of the powers of attorney. Id.

By North American standards, Colombia is a poor country. While the fishermen-plaintiffs eked out a living from the now-polluted waters, it is also true that their annual wages were never great. Thus, it is

abundantly clear that no individual fisherman suffered a loss greater than $50,000.00 (R. 90).

Because it holds several hundred powers of attorney, ANPAC's total claim in the instant case is for more than $50,000.00. But each individual fisherman's claim is for less than $50,000.00 It is only by aggregating these many small claims that the total demand exceeds $50,000.00 (R. 91)

Counsel for plaintiffs offered affidavits in support of the proposition that each individual fisherman's damages were less than $50,000.00 They also acknowledged each individual fisherman will be precluded from claiming more than $50,000.00, even after the case is remanded to the State courts. (R. 85, 92; Pet.Apdx. 53a, 56a). The above-referenced powers of attorney authorize counsel to make this stipulation. Id.

The affidavit of Dr. German Sarmiento

Palacio, plaintiffs' Colombian attorney, stated as follows:

> 6. Each of the individual plaintiffs in this action is a small-scale commercial fisherman who derive a living from the waters of the Bay of Cartagena, Colombia.
>
> 7. As a result of the June 19, 1989, chemical spill which is the subject of this lawsuit, each individual plaintiff suffered personal injuries, property damage, and/or loss of income.
>
> 8. While each individual fisherman suffered a loss of livelihood, annual wages in Colombia are lower than in the United States.
>
> 9. No individual fisherman suffered a loss greater than fifty thousand U.S. dollars ($50,000.00).

(R. 90 ; Pet. Apdx. 52a).

Defendants asserted at paragraph 3 of their notice of removal (R. 158, Pet.Apdx. 44a), that "ANPAC, et al. claim that their damages exceed $50,000.00" However, Plaintiffs' original state-court pleading says no such thing. Again, only the

aggregate claim exceeds $50,000.00.

The action was removed to the Federal Court on February 15, 1991. In removing, the defendants alleged diversity of citizenship. The defendants acknowledged, however, that on the face of the Petition there was not complete diversity because there were aliens (Colombians) on both sides. Defendants alleged that defendant Dow Quimica de Colombia, a Colombian corporation, was fraudulently joined as a defendant to defeat diversity.

## REASONS FOR DENYING THE WRIT

Under Rule 10 of this Court's Rules, Certiorari is generally appropriate to review conflicts between the circuits, or cases where a lower Court has "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision," or cases involving "an important question of federal law which has not been, but should be, settled by this Court. . . ."

None of these reasons for discretionary review has been cited or implicated by the Petition. Petitioner cites no conflict between the circuits. The case certainly does not call into question the supervisory jurisdiction of this Court. And because the issues decided by the Court of Appeals were exceedingly narrow in scope, the case does not involve an "important" federal question

as contemplated by the rule.

## I. THE COURT OF APPEALS PROPERLY CONCLUDED THAT THE "AMOUNT IN CONTROVERSY" WAS LESS THAN FIFTY THOUSAND DOLLARS.

It should first be noted that there is apparently no conflict between the circuits on this issue, and the Petition cites none.

It should also be noted that the issue in the instant case is exceedingly narrow. The Court of Appeals correctly framed the issue as whether remand was proper under the following limited circumstances:

> (1) the complaint did not specify an amount of damages, and it was not otherwise facially apparent that the damages sought or incurred were likely above $50,000;
>
> (2) the defendants offered only a conclusory statement in their notice of removal that was not based on direct knowledge about the plaintiff's claims; and
>
> (3) the plaintiffs timely contested removal with a sworn, unrebutted affidavit indicating that the requisite amount in controversy was not present.

988 F.2d at 566.

The Court of Appeals correctly held that, in these circumstances, remand was proper.

The gist of Petitioner's argument (Petition for Writ of Certiorari, pp. 5-12) is that each individual plaintiff's "amount in controversy" was above the jurisdictional limit. It should first be noted that defendants did not even make this argument in the District Court. While the motion for remand was pending, defendants argued only that the individual claims should be aggregated. (R. 68-73). Defendants never asserted while the motion to remand was pending that each individual plaintiffs' claim was actually for more than fifty thousand dollars. Since Petitioner raised the issue for the first time on appeal, certiorari would be improper. If this Court were to deem the issue important enough for review, it should do so in a case where the issue was properly briefed, and the record

sufficiently developed, in the District Court.

But even assuming that defendants have properly preserved this argument, it is clear that the Court of Appeals' decision was correct. The party seeking to invoke federal jurisdiction bears the burden of proof on the issue. Gaitor v. Peninsular & Occidental Steamship Co., 287 F.2d 252, 253-54 (5th Cir. 1961); McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189 (1936):

> If [the removing party's] allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof.

Id. at 189.

In the instant case, the defendants did not establish their right to remove by competent proof. Instead, the only "evidence" was a conclusory allegation in the Notice of Removal (R. 157, Pet. Apdx.

43a). The only statement in the Notice of Removal[2] to support that allegation was false. In short, there was no "competent proof," but only conclusory allegations.

The decision below is well supported by long-standing precedents of this Court and the Courts of Appeal. In other words, certiorari is not necessary to cure any conflict between the circuits or for supervisory reasons.

For example, in Gaitor v. Peninsular & Occidental Steamship Co., 287 F.2d 252 (5th Cir. 1961), which was decided when the jurisdictional limit was $10,000, the plaintiffs commenced an action in Florida state court which demanded damages "in language no more specific than 'in excess of $5,000.00.'" Id. at 253.

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[2]. The only factual allegation of the Notice of Removal was that "ANPAC, et al. claim that their damages exceed $50,000." (R. 158, RE 23). ANPAC, et al., never made any such claim.

In Gaitor, the Court held that subject matter jurisdiction was lacking due to lack of amount in controversy. In other words, it refused to double the number specified in the state-court pleading. In the instant case, the only allegation of the pleading is that total damages exceed $500.00, or that each individual plaintiff's claim exceeded the approximate sum of seventy one cents.[3] In Gaitor, the Court refused to double the amount in controversy from five thousand to ten thousand. In the instant case, plaintiffs respectfully submit that the Court should not increase it by a factor of 70,000, from seventy one cents to $50,000.

Another long-standing controlling

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[3]. The only allegation in the State court pleading was that "[d]amages far exceed the minimum jurisdictional limits of this [i.e. the Harris County District] court." That jurisdictional limit is $500.00. Texas Constitution, Article 5, Section 8. Furthermore, under Texas law, all claims must be aggregated to achieve the $500.00 limit. Vernon's Texas Gov't Code, Section 24.009.

precedent is Lindsey v. Alabama Telephone Co., 576 F.2d 593 (5th Cir. 1978). If Gaitor was on all fours, then Lindsey is on all fives with the instant case. Lindsey, a class action, also involved the issue of aggregation of claims. The state-court pleading asked for $1,002,000.00. Id. at 595. However, the petition nowhere alleged the number of persons in the class. Id. at 595. The Court of Appeals, citing this Court's decision in St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283 (1938), held that the $10,000.00 amount in controversy was not met:

> Significantly, the complaint nowhere alleges the number of persons in the class, an allegation that would have permitted the court to ascertain what dollar amount represents the "amount in controversy" for each member of the class. . . [I]t was not open for defendants to attempt to show that the class was small enough that the claims on its behalf exceeded the sum of $10,000.00 per capita. Nor was it open to the district court to speculate that such was in fact

the case.

Id. at 595.

In the instant case, the size of the class is known to be approximately seven hundred. Arguably, the dollar amount for each plaintiff is not stated (except for the state jurisdictional allegation, which amounts to a claim of seventy one cents per plaintiff). As the Court in Lindsey was not allowed to speculate as to the size of the class, defendants in the instant case are not at liberty to speculate as to the dollar amount per plaintiff.

Contrary to Petitioner's assertion, the instant case is completely distinguishable from St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283 (1938). At the time St. Paul Mercury was decided, the amount in controversy requirement was $3,000.00. Id. at 286. The state-court pleading in St. Paul Mercury demanded the sum of $4,000.00. Id. at 285. In other words, on the face of

the complaint (unlike in the instant case), the amount in controversy requirement was met. After the case was removed to Federal Court, the plaintiff filed an amended complaint. The amended complaint still demanded the sum of $4,000.00, but also had attached to it an exhibit asserting that the claimed injuries totalled $1,380.89. Id. at 285. The case was dismissed on the merits, and the Court of Appeals held, sua sponte, that the amount in controversy requirements were not met, due to the exhibit attached to the amended complaint. Id. at 285.

This Court simply held that because $4,000.00 was claimed at the time of removal, nothing changed when the amended complaint was filed. In the passage from the opinion quoted above, it is clear that the plaintiff reduced the amount of his claim with the amended complaint. Id. at 292-93.

In the instant case, the plaintiffs

never reduced the amount of their claim. As noted above, the only allegations of the state court pleadings were that each fisherman's damages exceeded the sum of seventy one cents. The motion to remand in this case and the affidavits submitted in connection therewith were simply submitted as evidence of the actual amount in controversy, as it existed at the time of removal.

The Court of Appeals' decision is also consistent with the policy of respecting federalism and legitimate concern for the integrity of State courts. This Court has held that the removal statutes should be construed narrowly:

> Not only does the language of the Act of 1887 evidence the Congressional purpose to restrict the jurisdiction of the federal courts on removal, but the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation. The power reserved to the states

> under the Constitution to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the Judiciary Articles of the Constitution. "Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined." Healy v. Ratta, 292 U.S. 263, 270; see Kline v. Burke Construction Co., 260 U.S. 226, 233, 234; Matthews v. Rodgers, 284 U.S. 521, 525; cf. Elgin v. Marshall, 106 U.S. 578.

Shamrock Oil & Gas Co. v. Sheets, 313 U.S. 100, 108-09 (1941). As noted above, the Court of Appeals' holding was narrow. It was largely based upon the fact that "the plaintiffs timely contested removal with a sworn, unrebutted affidavit indicating that the requisite amount in controversy was not present." 988 F.2d at 566.

To get around the narrowness of this holding, Petitioner argues that the sworn, unrebutted affidavits should not have been considered by the Court. Petition for Writ

of Certiorari at pp. 7-8. This issue, the admissibility of certain affidavits, was not decided contrary to any other prior ruling of this Court, nor of any other Court of Appeal. And this issue of admissibility affects only the instant case; it is not a question of general importance as to invoke the discretionary jurisdiction of this Court. In other words, it is a mere evidentiary ruling, hardly appropriate for review by Certiorari.

And it is also clear that the Court of Appeals acted properly in considering these affidavits. First of all, this evidentiary issue was decided in the first instance by the District Court: "The motion to strike the affidavits on the motion to remand is denied. I read them." (T. 42). The defendants have not shown in any way that the District Court abused its discretion on this evidentiary ruling. Indeed, since defendants never filed any cross appeal, the

issue is not even properly before the Court.

The gist of defendants' admissibility argument is that these affidavits should have been excluded because they did not include the magic words "personal knowledge." There has never been any requirement that an affidavit must recite these words. It is clear, however, from the face of these affidavits that the affiants had personal knowledge of the facts of the case.

The admissibility of certain affidavits is not the type of issue which the Court should consider on certiorari. This is especially true where, as here, the issue was correctly decided both by the District Court and the Court of Appeals.

The defendants had the burden of proof on this issue, an issue they chose not to address in the District Court. They failed to establish federal jurisdiction, and the Court of Appeals properly found that

jurisdiction was lacking. Accordingly, Respondents respectfully submit that certiorari is inappropriate on this issue.

## II. THE COURT OF APPEALS PROPERLY CONCLUDED THAT THE INDIVIDUAL PLAINTIFFS' CLAIMS COULD NOT BE AGGREGATED.

Petitioner next argues that the Court of Appeals erred in not aggregating the personal injury and economic loss claims of the individual plaintiffs. This argument is clearly contrary to the well-settled precedents of this Court. (This was the only argument advanced by Petitioner in the District Court in support of its position that the "amount in controversy" requirement was met.)

In the instant case, each individual plaintiff demands less than $50,000.00. It is true that plaintiffs' collection agent, ANPAC, has a total aggregated claim in excess of that amount. But it has been universally held that the amount in

controversy cannot be established by aggregating many small claims. Each individual claim must be judged on its own merits. The District Court cannot add up the small claims in order to determine the amount in controversy.

This rule was announced by this court in Waite v. Santa Cruz, 184 U.S. 302, 328-29 (1902):

> We adjudge that, as the plaintiff does not own the bonds or coupons in suit, but holds them for collection only, the Circuit Court was without jurisdiction to render judgement upon any claim or claims, whether bonds or coupons, held by a single person, firm or corporation against the city and which, considered apart from the claim or claims of other owners, could not have been sued on by the real owner by reason of the insufficiency of the amount of such claim or claims.

In the instant case , too, the individual fishermen are the "real owner" of their claims. ANPAC holds the claims for collection only.

Plaintiffs' Colombian attorney, who has studied law both in the United States and Colombia (R. 89, Pet.Apdx. 51a), testified by way of affidavit (R. 91, Pet.Apdx. 53a) that the powers of attorney in the instant case are, under Colombian law, virtually identical to the assignments described this court in Woodside v. Beckham, 216 U.S. 117, 119 (1910):

> [T]he claims other than [those of the named plaintiff] were assigned to plaintiff for the purpose of collection only; . . . he paid no consideration therefor, and . . . if plaintiff recovered upon the claims from defendants the amount of such recovery above the plaintiff's individual claim would be for the benefit of the several assignors thereof and would be distributed to them in proportion to the amount of the claim of each.

Thus, in the instant case, as in Woodside, the individual fishermen's claims cannot be aggregated in an attempt to reach the jurisdictional limits. Each claim must stand alone.

The rule of no aggregation of claims was applied in an environmental tort case similar to the instant in Zahn v. International Paper Co., 414 U.S. 293 (1973). In that case, the plaintiffs "sought damages from International Paper Co., a New York corporation, for allegedly having permitted discharges from its pulp and paper-making plant, located in New York, to flow into Ticonderoga Creek and to be carried by that stream into Lake Champlain, thereby polluting the waters of the lake and damaging the value and utility of the surrounding properties." Id. at 192.

The instant case is nearly identical; only a few names need be changed: Plaintiffs sought damages from Dow Chemical Company and Dow Quimica de Colombia, U.S. and Colombian corporations, for allegedly having permitted discharges from its chemical-making plant, located in Mamonal, Colombia, to flow into a creek and to be

carried by that stream into the Bay of Cartagena, thereby polluting the waters of the bay and damaging the value and utility of the surrounding fisheries.

This Court did not allow aggregation of claims in International Paper; it should not be allowed in the instant case.

Petitioner Claims that the plaintiffs were suing to enforce "integrated" or "undivided" rights. (Petition at p. 12). Petitioner cites the "classic statement of this exception," Pinel v. Pinel, 240 U.S. 594 (1916). Pinel is completely distinguishable. In Pinel, two family members ere suing together to recover undivided shares of a single piece of real property.

The instant case is not a fish wrongful death case. If it were, if the plaintiffs were actually suing in their capacity as the executors of the estate, as petitioner put it, of "100 sea bass" (R. 73), there might

be some merit to petitioner's argument.

But the instant case is one for personal injuries and economic loss. One of the leading environmental tort cases involving fishermen is Union Oil Co. v. Oppen, 501 F.2d 558 (9th Cir. 1974). In that case, the plaintiffs, like the plaintiffs in the instant case, were fishermen whose livelihood was destroyed by a spill. The court made clear that the action was one for "prospective pecuniary damage." Id. at 563. The court's ultimate holding was that "Neither [plaintiff nor defendant] should be permitted negligently to inflict commercial injury on the other." Id. at 570-71.

In the instant case, each individual fisherman has suffered his own "prospective pecuniary damage" and "commercial injury." One fisherman cannot collect for another fisherman's loss of business. Each stands alone, and the claims cannot be aggregated.

Plaintiffs are not suing for "damages for 100 sea bass killed by the spill," as defendants argued below (R. 73). Instead, plaintiffs are suing for the thousands of pesos each one lost because of the spill. The dead fish are only the means by which defendants inflicted the loss of business.

It should also be stressed that the instant case involves personal injuries caused to some of the plaintiffs. (R. 178, 179; Pet.Apdx. 382). It is difficult to see how the fishermen can collectively have an undivided interest in each other's skin rashes and other personal injuries.

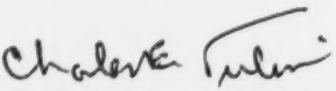
Since Petitioner's argument in this regard runs so afoul of well-settled precedent of this Court, Certiorari is not appropriate on this issue.

## CONCLUSION

For the above-stated reasons, the petition for a writ of certiorari should be denied.

December 8, 1993.

Respectfully Submitted,



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